

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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In the Matter of

)

MM Docket No. 91-58 /

)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Amendment of Section 73.202(b)

)

RM-7419

Table of Allotments

)

RM-7797

FM Broadcast Stations

)

RM-7798

(Caldwell, Texas, et. al.)

)

To: The Commission

OPPOSITION TO MOTION FOR STAY

Bryan Broadcasting License Subsidiary, Inc. ("Bryan"), by its attorneys, hereby submits its Opposition to the Motion for Stay filed on July 6, 2000 ("Motion") by Roy E. Henderson ("Henderson"). Henderson's Motion seeks a stay of the processing of the pending site change applications that were filed by the parties in the above-referenced proceeding. For the reasons set forth below, the Commission should deny Henderson's Motion with respect to Bryan's pending site change application.

Background

For the last ten years, Henderson has been fighting a losing battle with the Commission over its now meticulously-analyzed decision to amend the Table of Allotments to substitute Channel 297A for Channel 236A and to modify the license for Bryan's Station KTSR to operate on Channel 236C2. *See Report and Order*, 10 FCC Rcd 7285 (1995). Henderson has unsuccessfully appealed this decision numerous times. On May 24, 1990, Henderson filed an Application for Review of the Commission's 1990 Report and Order, which was dismissed on April 3, 1991. On May 17, 1991, Henderson filed a Petition for Reconsideration of the

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Commission's denial of his Application for Review, which was dismissed by the Commission in 1993. *See Memorandum Opinion & Order*, 8 FCC Rcd 4281 (1993). On July 5, 1995, the Commission released a *Report and Order* amending the Table of Allotments to substitute Channel 297A for 236A. *See Report and Order*, 10 FCC Rcd 7285 (1995). Bryan's subsequently-filed Petition for Reconsideration of this decision was denied by the Commission on May 9, 1996. *See Memorandum Opinion & Order*, 11 FCC Rcd 5326 (1996). On June 10, 1996, Henderson filed an Application for Review of this denial. The Commission denied the Application for Review on July 22, 1998. *See Memorandum Opinion & Order*, 13 FCC Rcd 13772 (1998). Henderson appealed this denial to the U.S. Court of Appeals for the District of Columbia on August 14, 1998. The court remanded the case (Case Nos. 98-1372 and 98-1385) back to the Commission on March 8, 1999. On February 15, 2000, the Commission released a *Memorandum Opinion and Order*, FCC 00-50 ("*MO&O*"), that affirmed the 1995 *Report and Order*. On February 24, 2000, Henderson filed an application that proposes a new site location for Station KLTR(FM), Caldwell, Texas, to operate on Channel 236 (FCC File No. BMPH-2000321AAO) (the "Henderson Application"). The Henderson Application, along with a Petition for Reconsideration of the *Memorandum Opinion and Order*, FCC 00-50, MM Docket No. 91-58 ("*MO&O*") that Henderson filed on March 15, 2000,¹ represent Henderson's final attempt to convince the Commission to reverse its decision in the allotment proceeding.

Now, with the filing of this unsupported Motion which would cause substantial harm to Bryan in light of a recently-filed Joint Petition to Cancel Operating Authority, Henderson is requesting the Commission to stop processing his Application, along with a modification application filed by Bryan to change tower locations to operate Channel 236 at an FAA-approved

¹ Bryan filed an Opposition to Petition for Reconsideration on March 30, 2000.

site² (the “Bryan Application”), until this proceeding that Henderson has appealed endlessly for the last ten years becomes “final.” As set forth below, the Henderson Application, which was filed after the release of the *MO&O*, is ungrantable and should be dismissed. Thus, there is nothing to stay with respect to that application. In contrast, the Bryan Application should be granted as soon as possible. Henderson simply has not met the showing required for a stay. As shown below, the grant of a stay is contrary to the public interest. Consequently, the Commission should deny this Motion, grant the Bryan Application and dismiss the Henderson Application.

Discussion

I. Henderson Has Not Made the Showing Required for the Grant of A Motion for Stay.

Henderson does not satisfy the elements set out in the four part test required for a Motion for Stay. As Henderson sets out in his Motion, the elements that must be satisfied to succeed on a Motion for Stay include the following: (1) a likelihood of prevailing on the merits; (2) a demonstration of irreparable injury unless the stay was issued; (3) a showing that other parties to the proceeding would not be substantially harmed by issuance of the stay; and (4) a showing that the public interest would be best served by the stay. *Virginia Petroleum Jobbers Association v. FPC*, 295 F.2d 921 (D.C. Cir. 1958).

In his Motion and in this case, Henderson does not even come close to making the showing required for a grant of this Motion. First, Henderson has very little chance of prevailing on the merits in this proceeding. For the last ten years, the Commission has rejected every one of

² FCC File No. BMPH-19990419IB

Henderson's appeals. Thus, there is no reason to believe that suddenly the Commission will change its mind.

Second, Henderson will not be irreparably injured if the stay is not granted. Any decision on these applications can be undone in the unlikely event that Henderson's rulemaking proposal is adopted. Granting the Bryan Application, and allowing Bryan to construct KTSR on its new channel, if Bryan so chooses, would not harm Henderson. As his station KLTR has never commenced operations, it will not have to change channels to allow KTSR's operation on Channel 236. Thus, Henderson is not harmed in any way, much less irreparably harmed, if the stay is not granted.

Third, other parties to this proceeding may be harmed if the stay is granted. On June 30, 2000, a Joint Petition to Cancel Operating Authority was filed against Bryan's Station KTSR by KRTS, Inc. and Nicol Broadcasting, Ltd. These parties seek to have KTSR change channels so that upgrades that were granted to them can be implemented. Staying the processing of the Bryan Application will prevent its grant and foreclose even the possibility that Bryan could construct KTSR in such a way as to accommodate these parties. Thus, other parties also will be harmed by the grant of the stay. This also brings into play the fourth element, that the public will be greatly harmed because the improved service on KTSR and on the other two stations cannot go forward. Consequently, an analysis of the elements which must be met for a Motion for Stay to be granted clearly show that this Motion must be denied.

II. The Commission's Rules Do Not Provide Henderson With Any Relief.

The decision to change KLTR's channel is not stayed by the filing of his March 15, 2000 Petition for Reconsideration or any other appeal Henderson has filed during this proceeding. The Commission's Rules explicitly state that the filing of a petition for reconsideration does not

stay the effective date of a decision or order. Section 1.429(k) of the Commission's Rules states that: "Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof." In 1996, the Commission released a *Report and Order*, 11 FCC Rcd 9501 (1996) (the "*Stay Order*"), which eliminated the rule which provided for an automatic stay, upon the filing of a petition for reconsideration, of an order in an allotment proceeding which modified an authorization to specify operation on a different channel. Prior to the *Stay Order*, the filing of petitions for reconsideration would automatically stay the effect of a change in the rules, such as a channel substitution in the Table of Allotments, pending action on the petition. This rule was eliminated because it gave opposing parties incentive to file meritless petitions that were only filed to stay the effective date of the change in the Table of Allotments.³ Henderson has already filed one Motion for Stay,⁴ and there is nothing new which warrants that any additional consideration be paid to this repetitive filing.

III. The Henderson Application Should Be Dismissed.

In his Motion, Henderson suggests that his Application should be treated the same as the Bryan Application. However, the *Stay Order* stated that parties requesting amendment of the Table of Allotments "may, upon release of an initial staff decision granting their request, proceed to implement the change through applications and construction notwithstanding the filing of

³ 11 FCC Rcd 9501 at ¶¶ 1 & 9-11 (1996).

⁴ The Motion for Stay that Henderson filed after the elimination of the automatic stay rule to stay the decision in the 1995 *Report and Order* to substitute KLTR's channel was dismissed by the Commission in *Memorandum Opinion and Order*, 1998 FCC LEXIS 3619 (July 22, 1998) at n.l.

petitions for reconsideration of the initial decision.”⁵ This means that, as of the effective date of the 1995 *Report and Order*, Bryan was permitted to file applications and operate KTSR on Channel 236C2. Similarly, this means that Henderson can only file applications for construction on Channel 297A. Parties are not permitted, as Henderson has done with the filing of his Application, to proceed as if the channel change is stayed during the pendency of the appeal. Consequently, Channel 236 is no longer allotted to Caldwell and cannot be used by Henderson’s KLTR. Thus, Henderson’s Application must be dismissed.

In accordance with Section 1.427 of the Rules, the Commission’s decision in its 1995 *Report and Order* to amend the Table of Allotments to substitute Channel 297A for Channel 236A at Caldwell, Texas became effective 30 days after it was published in the Federal Register, or on April 21, 1995.⁶ This is evidenced by the fact that the FM Table of Allotments currently specifies the channel allotted to Caldwell, Texas as Channel 297A, which was “substituted for Channel 236A effective 8/21/95,” and the channel allotted to College Station, Texas as Channel 236C2, which was “substituted for Channel 297C3 effective 8/21/95.”⁷ Consequently, any application Henderson filed subsequent to the 1996 adoption of the *Stay Order* had to propose operation on Channel 297, not Channel 236.

The bottom line is that the Henderson Application should be dismissed because Station KLTR is no longer permitted to operate on Channel 236. Station KLTR’s allotment has been moved to Channel 297. Consequently, the Henderson Application to change tower sites in order to operate on channel 236 is pointless, since that channel is no longer allotted to Caldwell. It’s

⁵ 11 FCC Rcd 9501 at ¶ 11 (1996).

⁶ 60 Fed. Reg. 35512 (1995).

⁷ 47 C.F.R. § 73.202 at nn.174 & 46.


that simple. Henderson cannot request the Commission's permission to change sites and operate on a channel on which his station is no longer authorized. In contrast, the Bryan Application should be granted as quickly as possible because Channel 236 has been allotted to College Station, and the Bryan Application fully meets all Commission requirements for operation on the new channel. Thus, the Bryan Application should continue to be processed, and the Henderson Application should be dismissed.

Conclusion

For the reasons set forth above, the Commission should grant the Bryan Application as quickly as possible, dismiss the Henderson Application, and deny Henderson's Motion.

Respectfully submitted,

**BRYAN BROADCASTING LICENSE
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Dated: July 19, 2000

CERTIFICATE OF SERVICE

I, Karleen Lamie, do hereby certify that I have, on this 19th day of July, 2000, mailed by first-class United States mail, postage prepaid, copies of the foregoing “**Opposition to Motion for Stay**” to the following:

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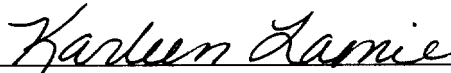
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